Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

COMMENTS

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SUMMARY

Cook Inlet Region, Inc. ("CIRI"), an Alaska Regional Corporation established by Congress, files these Comments on the Commission's proposals to implement a method of competitive bidding for spectrum-based licenses. As both an FCC-recognized minority-controlled entity and one whose members meet the Small Business Administration's definition of economically and socially disadvantaged, CIRI and its members are among Congress' intended beneficiaries of the "designated entity" preferences required by the recently-enacted Section 309(j) of the Communications Act. In these Comments, CIRI generally endorses the minority preferences the Commission has proposed, but recommends a number of additions or modifications to those proposals to better satisfy Congress' intent in making certain that any preferences flow only to Congress' intended beneficiaries.

As a threshold matter, CIRI demonstrates herein that the proposed minority preferences will pass constitutional muster under Metro Broadcasting's two-pronged intermediate scrutiny test. First, the congressional goal of providing economic opportunity for minority entities is supported by adequate congressional findings and has been found before to be an important governmental purpose. Second, the proposed preferential measures are substantially related to the achievement of the congressional goal since ensuring minority participation in the provision of spectrum-based

services will almost certainly provide economic opportunity for those entities. Nevertheless, the Commission must establish provisions for "exemption" of non-legitimate designated entities (i.e., strict eligibility requirements) and "waiver" of set-asides where no qualified designated entities apply.

As a bona fide minority-controlled entity, CIRI is sensitive to the need for strict eligibility and anti-sham requirements in any regime involving minority preferences. Specifically, CIRI urges the Commission to require that, in order for an applicant to qualify for a minority preference:

> (1) minorities must have clear structural control over the applicant (e.g., 51% voting control in corporate entities, bona fide general partnership status in limited partnerships);
>
> (2) minorities must have a minimum equity stake in the applicant (not less than 20%);
>
> (3) the minority's equity stake must not be subject to provisions which bring the minority's involvement into question (e.g., a "call" on its stake by non-minorities);
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> (4) the applicant must disclose, in easily discernible terms, how it meets each part of the eligibility test; and
>
> (5) the applicant must certify it meets the eligibility test and be subject to civil, criminal and administrative sanctions if the certification is found to be false.

As to the nature of the preferences to be employed, the Commission should utilize a wide array of measures to satisfy the congressional mandate. First, setting aside certain blocks of spectrum would certainly help to meet the

congressional goal of ensuring designated entity participation. The Commission must ensure, however, that the set-aside blocks are economically and technically viable ones. To avoid creating a "spectrum ghetto" in the proposed 20 MHz and 10 MHz PCS set-aside blocks -- which by themselves may not be attractive to potential co-venturers -- the Commission must permit combinatorial bidding on the set-aside blocks, authorize designated entities to aggregate a 20 MHz block with a 30 MHz block or with blocks held by in-region cellular operators (aggregations otherwise prohibited by the Commission's PCS Order) and consider reclassifying the set-aside 20 MHz block for MTA service.

Second, CIRI supports the Commission's proposal to utilize bidding preferences and suggests discounting the price payable by a designated entity by a predetermined factor based on the degree of minority participation in the entity.

Third, CIRI supports the Commission's proposal to offer installment payment plans to designated entities. However, the Commission should require a short repayment term (e.g., five years) and should employ a low interest rate for the installment plans such that the government does not make money on the "loans" to minorities. Finally, CIRI supports the Commission's proposal to employ tax certificates in the context of spectrum auctions.

In discussing the scope of minority preference provisions the Commission suggests it might limit

preferences to small businesses, to avoid what might be challenges to race or gender-based preferences. The Commission cannot take such an approach without contravening Congress' mandate to make available preferences to "small businesses" generally and "businesses owned by minority groups and women" (regardless of whether they are "small businesses").

In any event, if despite the sound constitutional basis upon which the proposed preferences rest and the clear congressional directive to adopt preferences for minority and female-owned businesses, the Commission is not disposed to adopt race or gender-based preferences, it can still satisfy the congressional mandate by awarding preferences to businesses owned by entities which are economically disadvantaged and therefore have been traditionally underrepresented in key segments of industry, including telecommunications.

As the Commission proposes, preferences available to rural telcos should be limited to license areas that coincide with the rural telco's local operating area since that would comport with Congress' intent. For the same reason, the Commission should make minority preferences available outside of the set-aside spectrum blocks. Offering installment payments and tax certificates to designated entities bidding on all spectrum blocks will help to avoid relegating designated entities to highly insulated service opportunities in the set-aside 20 and 10 MHz blocks.

CIRI supports the Commission's proposal to make preferential measures available to minority-inclusive consortia. This will encourage partnering between minority and non-minority firms and will help to increase economic opportunity for designated entities. However, the same strict eligibility requirements used to determine whether an applicant is an eligible "minority" should be applied to any consortium which wants to take advantage of minority preferences.

Finally, CIRI believes that the Commission must adopt strong safeguards to prevent the unjust enrichment of entities interested only in speculating on the value of Commission licenses. The Commission must ensure that only serious and qualified bidders participate in spectrum auctions by employing strict financial qualification standards and applying them across-the-board to all applicants (including minorities and other designated entities), by requiring a substantial up-front payment to enter an auction and prompt payment of a deposit on any licenses awarded in the auction, and by limiting the use of installment payment plans only for designated entities. CIRI opposes the use of a royalty plan because it would be too costly and intrusive to administer. Finally, CIRI favors a bright-line two year anti-trafficking restriction, but recommends that the restriction be waived for sales to other designated entities.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM") adopted by the Commission on September 23, 1993 and released on October 12, 1993.

I. INTRODUCTION

This proceeding represents a watershed event in the history of the Commission. Pursuant to the authority vested in it by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),[1/] the Commission is finally able to address effectively an issue which it has confronted on numerous

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[1/] The Budget Act amended the Communications Act of 1934, adding a new Section 309(j) authorizing the Commission to use competitive bidding to award licenses under certain circumstances.

occasions in the past: how to efficiently, fairly and without administrative or judicial delay, allocate scarce spectrum resources and award licenses to those who place the highest value on such licenses while, at the same time, ensuring that real opportunities for businesses owned by minority groups -- as well as other economically-disadvantaged entities -- are provided. Congress has directed the Commission to structure a competitive bidding system which achieves: (1) the development and rapid deployment of new technologies, products and services; (2) promotion of economic opportunity for certain disadvantaged groups which are underrepresented in ownership of spectrum licenses today; (3) recovery for the public of a portion of the value of the electromagnetic spectrum and (4) efficient and intensive use of the spectrum.[2/]

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. §§ 1601 et seq. (1971). CIRI is owned by approximately 6,500 Athabascan, Eskimo, Aleut, Haida, Tlingit and other Native American shareholders. A majority of those shareholders are women. Under definitions applied by the Small Business Administration ("SBA") CIRI's members are both "socially" and "economically disadvantaged" for purposes of applying

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[2/] See Section 309(j)(2)(B). See also Section 309(j)(4).

SBA rules and regulations.[3/] As both an FCC-recognized minority-controlled entity and an organization whose members are deemed to be "disadvantaged" by the SBA and therefore are among the intended beneficiaries of the Budget Act's preference provisions, CIRI has a vital interest in ensuring that the enhanced opportunities for minorities and small businesses to participate in spectrum-based services mandated by the Budget Act are reflected in the Commission's final auction scheme. For this reason, CIRI's Comments focus primarily on the Commission's proposals concerning the role that "designated entities" can and should play in the competitive bidding regime to be adopted by the Commission.[4/]

In particular, CIRI will first address the Commission's minority preference proposals,[5/] including the reasons why

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[3/] Each of the thirteen Regional Corporations is, in essence, a congressionally-compelled economic aggregation of persons of Alaska Indian, Eskimo, or Aleut blood, all of which are disadvantaged. See ANCSA, § 7, 43 U.S.C. § 1606(d) 1988; 13 C.F.R. Part 124.

[4/] Unless otherwise indicated, CIRI's Comments will deal with proposals to enhance the role of minority groups (as opposed to other "designated entities") in spectrum-based services. Moreover, because Personal Communications Services ("PCS") licenses must be awarded soon, CIRI discusses in detail how the Budget Act's mandate with respect to minority group participation applies to the Commission's proposals for PCS licensing. See Second Report and Order in GEN. Docket No. 90-314, FCC 93-451, (rel. September 23, 1993) ("PCS Order").

[5/] CIRI will use the term "minority preference" as a shorthand expression encompassing the variety of proposals which would enhance the opportunities of minorities to

they pass constitutional muster and the type and scope of minority preferences necessary to satisfy the Budget Act's mandate. Second, CIRI's Comments address strict eligibility, anti-trafficking, anti-sham and other provisions which the Commission should adopt to ensure that only entities eligible for preferences -- and which also are serious and qualified bidders -- receive the preferential treatment mandated by Congress. As a bona fide minority-controlled entity, CIRI is particularly sensitive to the need for such safeguards.

II. TO FULFILL ITS CONGRESSIONAL MANDATE THE COMMISSION MUST ADOPT MINORITY PREFERENCE PROVISIONS

Congress has directed the Commission to ensure that minorities (and other designated entities) not only have an opportunity to participate in the provision of spectrum-based services whose licenses will be awarded through competitive bidding, but also that they receive enhanced opportunities to do so. This is evident in Section 309(j)(3)(B)'s mandate that "the Commission . . . shall seek to promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." Similarly, Section 309(j)(4)(C) requires the Commission, in prescribing its regulations, to "prescribe area designations and bandwidth assignments that

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participate in spectrum-based services.

promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Most significantly, Congress directed the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." Section 309(j)(4)(D) (emphasis added).

The Commission has responded to this congressional mandate with proposals for PCS set-asides,[6] bidding preferences,[7] installment payments,[8] and tax certificates.[9] CIRI supports adoption of all of these preferences as long as the Commission vigilantly enforces a strict definition of eligibility. Before commenting on the proposed preferences (and others) and the appropriate criteria for minority eligibility, CIRI will address the threshold question posited by the Commission in the NPRM: whether preferences for minority groups enabling them to participate in spectrum-based services can pass

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[6] NPRM at ¶¶ 73, 76, 121.

[7] Id. at ¶¶ 73, 76, 80 n.61.

[8] Id. at ¶¶ 69, 73, 76, 79-80, 80 n.57.

[9] Id. at ¶¶ 73, 79, 79 n.58, 80 n.64, 121-22.

constitutional muster. As demonstrated below, if the Commission adopts appropriate provisions to police such congressionally-mandated preferences they will pass constitutional muster.

The single most significant fact buttressing the constitutionality of the proposed minority preferences is that they are congressionally mandated. As the Commission recognized: "[A]ny benign race or gender-conscious measures mandated by Congress -- even those not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[10/] Accordingly, the Commission stated that "race or gender-conscious measures adopted in this proceeding would have to be supported by a record which demonstrates that such preferences are substantially related to the objectives of the Budget Act."[11/]

The proposed minority preferences are constitutional, not only because they are substantially related to the

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[10/] NPRM at ¶ 73 citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 560-563 (1990) ("Metro"), Richmond v. J.A. Croson Co.; 488 U.S. 469 (1989) ("Croson"), Fullilove v. Klutznick, 448 U.S. 448 (1980) ("Fullilove") and Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) ("Lamprecht").

[11/] Id.

objectives of the Budget Act, but also because they serve a legitimate remedial purpose.

A. The Proposed Minority Preference Provisions Will Pass Constitutional Muster

1. Standard of Scrutiny to be Applied

The standard articulated by the Commission for reviewing benign race or gender-conscious measures mandated by Congress is known as "intermediate scrutiny."[12/] NPRM at ¶ 73. Under the Metro Broadcasting decision, a Court applying intermediate scrutiny to preferential measures examines whether they "[1] serve important governmental interests within the power of Congress and [2] are substantially related to achievement of those objectives." Metro Broadcasting, 497 U.S. at 564. If the preferential measures are found to satisfy both prongs of the test, then the measures will be held to be constitutionally permissible.

CIRI agrees with the Commission's conclusion that intermediate scrutiny will be employed by a court reviewing the constitutionality of any minority preference program implemented by the Commission under Section 309(j)(4)(D).

[12/] See Metro Broadcasting, 497 U.S. at 606 (O'Connor, J., dissenting). In lieu of intermediate scrutiny, the Supreme Court has applied what is called strict scrutiny to minority preference programs not mandated by Congress. See City of Richmond v. J.A. Croson Company, 488 U.S. 469, 505-507 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). Strict scrutiny examines whether preferential measures serve compelling governmental objectives and are necessary to the achievement of those objectives.

First, the Metro Broadcasting decision, which enunciated the intermediate scrutiny standard for benign racial preferences, is the most recent pronouncement by the Supreme Court on the issue of congressionally-mandated minority preferences. Second, intermediate scrutiny is consistent with the deference to congressional enactments which the Supreme Court has shown in previous minority preference decisions. For example, in Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court showed a great deal of deference to the congressional determination that remedial measures for minorities were necessary, declaring, "[I]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Id. at 483. In that case, the Court upheld the congressionally-mandated minority preference provision of the Public Works Employment Act of 1977.

In his opinion in Fullilove, Chief Justice Burger indicated that the minority business enterprise program upheld in that case could have been ordered by Congress pursuant to the Spending Power of Article I, § 8, cl. 1 of the Constitution, or pursuant to the Commerce Power of

Article I, § 8, cl. 3. Fullilove, 448 U.S. at 473-75. The parity among these various grants of authority was clear:

> If, pursuant to its regulatory powers, Congress could have achieved the objectives of the [minority business enterprise] program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the [program] through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

Id. at 475 (emphasis added).

In City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), on the other hand, the Court struck down a minority-preference provision that, while patterned on the program upheld in Fullilove, was legislated by a municipal government, not by Congress. In a separate opinion, Justice O'Connor observed: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." Id. at 490. In Croson, as in Fullilove, the deference shown to the considered judgment of Congress was clear.

For these reasons, CIRI agrees that the intermediate scrutiny standard articulated by the Court in Metro Broadcasting is the standard that will be applied to any congressionally-mandated preference programs adopted by the

Commission in this proceeding. As the Commission recognized, an examination of the proposed minority preference provisions under the two prongs of intermediate scrutiny requires analysis of (1) whether the preferences serve an important governmental purpose, and (2) whether the preferences are substantially related to the achievement of that purpose. As shown below, the proposed preferences meet both tests.

2. The Record Supports a Showing that Minority Preferences Serve an Important Governmental Purpose

The provisions in Title VI of the Budget Act, when read together, indicate that Congress, in mandating preferential measures, intended to enhance the economic opportunities for members of minority groups and women to participate in the telecommunications businesses for which licenses would be issued by auction. NPRM at ¶ 73 n.48. Thus, the principle governmental purpose of Congress in directing the Commission to consider preferential measures in section 309(j)(4)(D) was to enhance the economic opportunity for those underrepresented groups through the provision of spectrum-based services.

Although there are no specific findings in the legislative history of the Budget Act with respect to the lack of economic opportunity for minority-owned businesses, Congress has previously examined that lack of opportunity and the resulting underrepresentation of such groups, both

in and out of the communications context. For example, in a House conference report accompanying the Communications Amendments Act of 1982, the Conference Committee noted that diversifying the media of mass communications was important because it promoted "ownership by racial and ethnic minorities — groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities . . . ." H.R. Conf. Rep. No.765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287. The Committee continued:

> The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has severely affected their participation in other sectors of the economy as well. We note that . . . of 8,748 commercial broadcast stations in existence in December 1981, only 164, or less than two percent, were minority owned. Similarly, only 32 of the 1,386 noncommercial stations, slightly over two percent, were minority owned.

Id. at 43-44, U.S.C.C.A.N. at 2287-88.

Similarly, in debate on a Department of Defense minority-owned business preference program, Members of Congress cited the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority groups at the same time (26.7 percent) as evidence that a preference was needed. 131 Cong. Rec. H. 4981, 4982-83 (daily ed. June 26, 1985) (statements of Reps. Savage and

Conyers). In debate on a Department of Transportation minority-owned business preference program enacted in 1982, the sponsoring legislator argued for the acceptance of his program on the basis that minorities at that time were experiencing unemployment greater than the national average (20 percent black unemployment versus the national figure of 10.8 percent). 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (statement of Rep. Mitchell). In each of these cases, Congress has examined the lack of economic opportunities for minority-owned enterprises and, in the course thereof, has developed an institutional expertise on the issue of the underrepresentation of such entities in key industry segments, including telecommunications.

In his concurring opinion in Fullilove, Justice Powell elaborated on the unique role of Congress in the governance of the nation, and the effect of that role on the type of record upon which Congress may rely when legislating in the area of minority preferences:

> [The] special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 502-03 (Powell, J., concurring) (emphasis added).

In the 1990 Metro Broadcasting decision, the Court quoted this passage as a preface to an extended discussion of the experience of Congress with minority preferences in the communications field. Metro Broadcasting, 497 U.S. at 572. See also id. at 572-579 (detailing the many times Congress has considered telecommunications minority preferences). In Metro Broadcasting, as in Fullilove, the Court determined that a full appreciation of the legislative process counseled against a court limiting its analysis to the legislative history of the particular Act under review.

The congressional goal of creating economic opportunities for minority entities has been found before to be an important governmental purpose. In Fullilove, for example, the Court considered the merits of a minority preference provision of the Public Works Employment Act of 1977. The provision required that, absent administrative waiver, at least 10 percent of federal funds granted for local public works projects was to be used by the state or local grantee to procure services or supplies from businesses owned by minority group members. Underlying that provision was a congressional determination that the minority business community was "'sorely in need of economic stimulus but which, on the basis of past experience with government procurement programs, could not be expected to

benefit from the public works programs as then formulated.'" Fullilove, 448 U.S. at 459 (quoting 123 Cong. Rec. 5097, 5097-98 (1977) (remarks of Rep. Mitchell)). Moreover, another legislator indicated that the preference was intended to "'promote a sense of economic equality in this Nation.'" Id. (quoting 123 Cong. Rec. at 5331 (remarks of Rep. Biaggi)). Against this background, the Court found that the establishment of a preference was within the power of Congress. Id. at 475-77.

Similarly, the Department of Transportation minority preference program discussed above, which mandates that not less than 10 percent of the funds authorized to be appropriated for state highway projects is to be expended with businesses owned and controlled by socially and economically disadvantaged individuals, was upheld in the face of a challenge to its constitutionality in 1992. In that case, a U.S. District Judge applied the Metro Broadcasting intermediate scrutiny standard and ruled that the provisions of the program were substantially related to what the judge concluded was an important congressional purpose. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 245 (D. Colo. 1992).

Therefore, for the purposes of constitutional scrutiny, past congressional findings and debate can and do buttress the record upon which Congress acted in legislating remedies for the chronic underrepresentation of minorities in

numerous areas of our economy in general and in the field of telecommunications in particular. Congress has considered the lack of opportunities for minority group members in the communications field (and other areas) before, and it is entitled to rely on those deliberations here. Those deliberations reveal the considered judgment of Congress that it is appropriate to create economic opportunities for minority-owned businesses through the use of preferences in the distribution of telecommunications licenses. That is the important governmental purpose behind the mandated preferences in the Budget Act and it is supported by sufficient congressional findings both in the legislative history of that Act and in prior legislation dealing with similar issues.[13/]

3. The Section 309(j)(4)(D) Preferences are Substantially Related to that Important Governmental Purpose

The second prong of the Metro Broadcasting intermediate scrutiny standard examines whether the remedial scheme (in this case, the minority preferences) is substantially related to the important governmental objective. That test is met here. In light of the scarcity of frequencies

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[13/] The congressional findings with respect to minority underrepresentation, barriers to entry and lack of economic opportunity are consistent with similar conclusions reached by numerous other groups who have examined the issue. We provide, in Appendix A, a list of reports and studies which reflect the same conclusions on this point as that reached by Congress.

available for telecommunications services, assisting a minority-owned enterprise in being awarded licenses by affording them enhanced opportunities to win auctions for those licenses almost certainly operates to create economic opportunities for that business. Through the use of that license, a minority business enterprise will be positioned to generate revenues that otherwise might not be available to it for a variety of reasons. Thus, the preferential measures mandated by Congress are substantially related to Congress' purpose in enacting those measures -- to create economic opportunities for minority owned-businesses.

As discussed above, Congress has developed an institutional expertise on the need for minority preferences. That expertise, premised on past findings of minority disadvantage, is entitled to great weight from reviewing courts. In mandating specific preferences for members of minority groups in the past, and in the instant case, Congress has made clear its view that the goal of creating economic opportunities for minorities is advanced by such preferential measures. The Supreme Court upheld similar measures based on such reasoning in Fullilove.

Notwithstanding the fact that the preferential measures at issue in this proceeding are substantially related to a legitimate governmental objective, the substantial relationship test also requires a reviewing court to examine whether the remedial scheme is narrowly tailored to achieve

the objectives of Congress. For example, central to the conclusion of Chief Justice Burger's plurality opinion that the Public Works Employment Act program in Fullilove was narrowly tailored was the fact that the program contained specific, congressionally-mandated provisions for exemption and waiver. Those provisions ensured that only legitimate minority-owned businesses participated in the program (exemption) and that the 10 percent subcontracting requirement would not be enforced when no qualified minority-owned businesses were available (waiver). Without those provisions, it is likely that the Supreme Court would have found the 1977 plan to be overinclusive and, thus, not narrowly tailored. See Fullilove, 448 U.S. at 486-87.

Similarly, the U.S. District Court for the District of Colorado upheld the Department of Transportation minority-preference program in 1992 largely because Congress mandated a state-run certification program that annually identifies disadvantaged business enterprises eligible for the program in order to prevent misrepresentation. Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 244-45 (D. Colo. 1992). On the other hand, that same program has no congressionally-mandated waiver provision. Instead, a waiver from the 10 percent disadvantaged business subcontracting requirement can be had only upon application to the Secretary of Transportation under agency-promulgated regulations. See 49 C.F.R. § 23.64(e). Nevertheless, the